Supreme Court, U.S.
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No. 02-22

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In The
Supreme Court of the United States

CHARLES C. YEOMANS,

Petitioner,

v.

ELLIOTT SCHWARTZ, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court certified a settlement-only class, approved the proposed settlement, rejected all objections, and ruled that class notice complied with Due Process and Rule 23 of the Federal Rules of Civil Procedure. On appeal, an objecting class member contended that individual notice had not been provided to known and readily located class members, as required by Rule 23(c)(2). The Ninth Circuit held that objections to notice had been waived and affirmed the district court's judgment.

Question Presented: Must an appellate court review a challenge to a settlement-only class based on a contention that the required Rule 23(c)(2) individual notice was not sent to each class member who could be identified through reasonable effort?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Charles C. Yeomans was an appellant below. Appellants from the same district court proceedings whose appeals were set for oral argument with petitioner's appeal were: David G. Behenna; and Steven C. Simon, Alan J. Spitz, and Daniel J. Kelley.

The respondents in this Court, appellees below, are: named plaintiffs Elliott Schwartz, Nicole C. Giampaulo, Willie Jo Jimmerson, Daniel Ryan, and Mary Ann Williams, each individually and on behalf of all others similarly situated; and defendants Citibank (South Dakota), N.A., Universal Bank, N.A., and Universal Financial Corporation.

Other persons named in the Court of Appeals' caption, but who neither participated in petitioner's appeal nor are respondents here, are John G. Davisson, James W. East, Carmen Schiltz, Mitchell A. Guzik, Debra Ramchandani, Franklin Grady, J. Garrett Kendrick, Margaret Winkler, and Hannah Feldman, all designated as "Intervenors" in the caption for petitioner's appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Charles C. Yeomans respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Petitioner appealed from a judgment certifying a settlement-only class, approving a proposed class settlement, and issuing an injunction against all class members. The district court's final judgment and order granting final approval of the proposed settlement (Pet. App. 8-13) is unpublished. The Ninth Circuit's memorandum opinion (*id.* 1-7) holding that the issue of the deficiency in individual notice had been waived is designated "not for publication" and is unpublished.

JURISDICTION

The Ninth Circuit entered its memorandum opinion on October 10, 2002. Petitioner filed a timely petition for panel rehearing or rehearing en banc, on October 23, 2002; the order denying that petition was entered on November 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

U.S. Const. amend. V, cl. 3 provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . "

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts. . . . "

28 U.S.C. § 2106 provides in relevant part: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review. . . . "

Rule 23(c)(2) of the Federal Rules of Civil Procedure provides in relevant part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Rule 23(c)(3) of the Federal Rules of Civil Procedure provides in relevant part: "The judgment in an action maintained as a class action under subdivision (b)(3) . . . shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

Rule 23(e) of the Federal Rules of Civil Procedure provides in relevant part: "[N]otice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

STATEMENT OF THE CASE

This petition arises from a consumer class action lawsuit. Respondents are the plaintiffs and the defendants named in the pleadings. Respondents have agreed with each other to settle the suit.

Petitioner, a member of the settlement-only plaintiff class, filed timely objections to the proposed class certification and settlement. The district court, however, overruled all of the objections filed. In its final judgment, the district court also ruled that the notice given of the pendency of the lawsuit and the proposed settlement "complied fully with Rule 23 of the Federal Rules of Civil Procedure, due process, and any other applicable laws. . . . " (Pet. App. 9)

The question presented is whether, on petitioner's appeal from the final judgment, the Ninth Circuit is required to address a challenge that the notice given did not include individual notice to all class members who could be identified through reasonable effort, as required by Rule 23(c)(2).

1. The underlying suit focuses on the payment-crediting practices of the defendant credit-card issuers, Respondents Citibank (South Dakota), N.A., Universal Bank, N.A., and Universal Financial Corp. The claims pleaded include allegations of violations of the federal Fair Credit Billing Act and regulations thereunder. The action was removed from a California state court to the federal district court on the basis of federal question jurisdiction under 28 U.S.C. § 1331, with supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

2. Respondents reached a proposed settlement before an answer was filed or any further proceedings in the litigation. The proposed settlement included certification of an opt-out, settlement-only class comprised of those who, as of July 11, 2000, did hold or had held at least one credit card issued by a defendant. Certain class members would receive an automatic rebate or refund to their accounts under the settlement; the claims of all class members relating to defendants' payment-crediting practices would be released and barred, and all class members would be subjected to an injunction against complaining about defendants' conduct in the future so long as that conduct conformed to certain standards set forth in the settlement agreement.

a. In their settlement agreement, respondents planned to combine the Rule 23(c)(2) notice of the right to opt out of the class with Rule 23(e) notice of the proposed settlement. The plan was to send individual, mailed notice to only those putative class members who were to receive an automatic refund or rebate *and* would be sent a credit-card statement during the month of July 2000. Putative members who did not meet both criteria would not be sent individual notice.

As agreed in the settlement plan, individual notice was in fact sent only to certain cardholder class members. Class members who were not sent a statement during July 2000 were not mailed individual notice, and cardholders who were not slated for an automatic refund or rebate under the settlement were not sent individual notice even if they were mailed a credit-card statement that month.

b. Upon opening the mailed statement for his Citibank credit card in mid-August 2000, petitioner discovered an individual notice of the pendency of the lawsuit and the proposed settlement. Petitioner unsuccessfully sought from plaintiffs' counsel additional information about the proposed settlement, including a copy of the settlement agreement. At or before the August 31, 2000 deadline for objecting or opting out of the class, petitioner filed objections to the proposed settlement, requesting that the proposed settlement not be approved. These objections emphasized the untimeliness and substantive inadequacy of the notice given and questioned the fairness of the proposed settlement, the satisfaction of the Rule 23(a) prerequisites to a class action, and the maintainability of a Rule 23(b)(3) class. (Pet. App. 17-27) Petitioner did not point out the failure to provide individual notice to all class members who could be identified through reasonable effort.

c. The final judgment, drafted and tendered by the plaintiffs' counsel, certified a settlement-only class, approved the proposed settlement, released and barred claims of those class members who did not opt out, and enjoined them from asserting claims regarding any future conduct of the defendants which met various stipulations in the settlement agreement. (Pet. App. 8-13) The class certified was described as:

> All consumers . . . who had as of July 11, 2000, or have had, one or more Visa or MasterCard credit card accounts marketed under the "Citibank" or "AT&T Universal Card" brands.

(Pet. App. 9) In their entirety, the findings and holdings as to the notice given were as follows:

> [T]he Class Notice (i) constituted, under the circumstances, the most effective and practicable notice of the pendency of this lawsuit, the Settlement Agreement, and the Approval Hearing, and (ii) complied fully with Rule 23 of the Federal Rules of Civil Procedure, due process, and any other applicable laws. . . .

(Pet. App. 9) The judgment was entered October 17, 2000.

3. Petitioner filed a timely appeal from the final judgment. The inadequacies of the notice given, including the failure to provide individual notice to all class members reasonably identifiable, were raised and argued in his initial brief. In addition, petitioner argued that the class certified could not meet the requirements of Due Process and Rule 23 and that the settlement agreement should not have been approved.

a. The main response to the challenges raised by petitioner was an argument that his appeal could (or should) not be heard because he had not requested intervention in the district court proceedings and so did not have the power to appeal the judgment. On the motion of the defendant-respondents, the Ninth Circuit suspended consideration of petitioner's appeal pending this Court's decision in *Devlin v. Scardelletti*, No. 01-417. Petitioner and the defendant-respondents submitted *amicus curiae* briefs in *Devlin*.

b. Respondents did not contend that individual notice was directed to all class members who could be identified through reasonable effort; instead, they argued that there was no requirement that every class member receive actual notice, that the notice plan was reasonable,

and that the contents and timing of the notice given were adequate.

4. A panel of the Ninth Circuit affirmed the judgment in a memorandum opinion filed October 10, 2002. (Pet. App. 1-7) The opinion followed *Devlin v. Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005 (2002), by recognizing that the objector-appellants had standing to appeal the district court's judgment. (Pet. App. 3) In its entirety, the opinion's discussion of the notice issues was as follows:

> The claims asserted on appeal challenging the timeliness and sufficiency of notice have been waived because they were not raised in the district court. *Arizona v. Components, Inc.*, 66 F.3d 213, 217 (9th Cir. 1995).

(Pet. App. 5)

5. Petitioner filed a timely petition for panel rehearing or rehearing en banc. Among other things, the petition pointed out that the failure to direct or provide individual notice as required by Rule 23(c)(2) was an issue that neither was, nor could be, "waived." By order filed November 18, 2002, the petition was denied.

6. This petition followed.

REASONS FOR GRANTING THE WRIT

In holding that an issue of compliance with Rule 23(c)(2) is waivable, the Ninth Circuit has decided an important federal question in a way that conflicts with decisions of this Court. Constraints on the full and searching review of class settlement decisions thwart the mandates of Rule 23 and undermine the right of objecting class

members to obtain review of class settlements. In particular, a claim that the settlors have not met the individual notice requirements of Rule 23(c) must be considered by a Court of Appeals when an appeal from a class certification and settlement is lawfully brought before it for review.

Even if an issue of compliance with the individual notice requirement of Rule 23(c)(2) can be waived, however, it undermines Due Process and the proper supervision of class settlements to decline review merely because that issue was not raised with particularity in the appellant's objections to the proposed settlement and certification. Furthermore, the Ninth Circuit's invocation of waiver doctrines to avoid consideration of petitioner's contention about deficiencies in the distribution of notice so departs from acceptable practice by appellate courts as to call for the exercise of this Court's supervisory power.

I. Treating a deficiency in Rule 23(c)(2) individual notice as a waivable issue is antithetical to this Court's *Devlin*, *Amchem*, and *Eisen* decisions.

1. In *Devlin* v. *Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005 (2002), this Court confirmed the right of an objecting class member to appeal from the approval of a settlement over his objections. Many of the Courts of Appeals had adopted as a precondition for such an appeal a requirement that the objecting class member intervene (or apply to intervene) as a party to the district court proceedings. The Court rejected this limitation on objectors' ability to obtain direct review of Rule 23(e) decisions: "To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that

will ultimately bind them, despite their expressed objections before the trial court." *Devlin*, 122 S. Ct. at 2011.

By vindicating the appeal right of objectors, *Devlin* ensures that appellate courts cannot avoid their important duty to provide close scrutiny of the outcome of class actions, with an eye towards protecting the disposition of class members' rights. Often, if an objector does not appeal from a class settlement approval, no one will.[1] Objectors thus may repeat at the appellate level their essential role of voicing dissatisfaction with the settlement,[2] supplying some of the adversarial exposition of issues and concerns otherwise lacking. Furthermore, settlors are more likely to structure their settlement to benefit all class members, and to comply fully with procedural protections for absent class members if it is clear that objectors can obtain appellate review of class certification and settlement approval decisions.

Confirmation *that* an objector can appeal, however, leaves open the important question of *what* issues must be reviewed when raised as part of an objector's appeal.

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[1] The only other participants in the district court proceedings are the settlors who have obligated themselves to defend the settlement.

[2] There is a marked mistrust of those who object to a settlement rather than opt out of the class. Differences between class members, however, may make it individually rational and legitimate for some to express their dissatisfaction through objections while others choose to exit from the class; furthermore, encouraging opt-out (exit) over objections (voice) is likely to yield an increasingly rapid deterioration in the quality of class settlements. *See* Albert O. Hirschman, EXIT, VOICE, AND LOYALTY 45-52 (1970) (discussing individual decisions between exit and voice responses and explaining the deterioration dynamic).

Every court of appellate jurisdiction has been granted the power, under 28 U.S.C. § 2106, to vacate, set aside, or reverse any judgment lawfully brought before it for review. Appellate courts rightly hesitate to decline review of claimed errors,[3] doing so only when an issue has been neither raised nor decided in the court below. *See, e.g.*, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). Furthermore, an appellate court may consider even those claims, arguments, or issues neither raised nor decided below under certain circumstances. *See, e.g.*, *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).[4]

Nonetheless, the Ninth Circuit has now seized on "waiver" – mentioned in *Devlin*, 122 S. Ct. at 2012, as an issue "typically addressed" by an appellate court – to justify its refusal to review petitioner's contention that the minimal notice requirements of Rule 23(c)(2) were not met. This is an unprecedented use of waiver doctrine, which erodes the meaningfulness of the appeal right guaranteed to objectors by *Devlin*. It also conflicts with the

[3] Although there is no constitutional right to an appeal, once such a right has been granted it cannot be taken away arbitrarily or capriciously without running afoul of the Fifth Amendment's Due Process guarantee. *See generally*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996); *United States v. MacCollom*, 426 U.S. 317, 323-24 (1976) (plurality opinion); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972).

[4] *See also Nuelson v. Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) (declaring that a "rigid and undeviating" waiver rule would do "violence to statutes which give federal appellate courts power to modify, reverse or remand decisions 'as may be just under the circumstances' ").

Court's precedents requiring careful scrutiny of settlement-class certification and emphasizing the fundamental importance of class notice requirements.

2. This Court dealt with settlement-only classes for the first time in *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997), and there warned that requests to certify a settlement class action require more searching scrutiny than requests to certify for litigation purposes. "When a district court . . . certifies for class action settlement only, the moment of certification requires 'heightened attention,' to the justifications for binding the class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999) (citing *Amchem*).[5] However, district judges burdened with crowded dockets often have a strong interest in disposing of these cases quickly and thus may be predisposed toward class settlements. *See generally*, David J. Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2082 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122-28 (1996); John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1348 & n.14 (1995). At the same time, the district court's ability to scrutinize the proposed certification and settlement is hampered by the lack of adversity between the settlement

[5] Similarly, many of the Courts of Appeals have decided that a settlement approval that takes place prior to formal class certification requires a higher standard of fairness. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (adopting rule and collecting cases).

proponents. *Amchem*, 521 U.S. at 621; *Ortiz*, 527 U.S. at 847.[6]

Following *Amchem*, appellate courts have characterized the initial responsibility in weighing settlement-only certification and settlement approval as that of a fiduciary for the unnamed class members. *See, e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002); *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 851 (Ind. 1997). Recognition of the lower court's duty would be hollow, however, if the appellate courts were themselves derelict in reviewing judgments certifying settlement-only classes and approving class settlements.[7] Effective review on appeal "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 408-11, 425-26 (1995). The rulings on such review also provide important guidance to lower courts for later cases. In *Amchem* and *Ortiz*, this Court provided the model for

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[6] *See also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991) (characterizing some Rule 23(e) "fairness" hearings as "pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel").

[7] It has been noted that (a) appellate courts share some of the district courts' interest in approval of class settlements and (b) dependence on the record made in the district court infects the appellate level with the problems arising from the lack of adversity between the settlors. Koniak & Cohen, 82 VA. L. REV. at 1124-25.

careful and thorough review of settlement-class certifications for their compliance with Rule 23(a) and (b) requirements.[8]

Declining to review a contention that class notice did not meet the requirements of Rule 23(c)(2) thus is unsustainable. Indeed, a finding of "waiver" with respect to a ruling that is required to support certification or settlement of a settlement-only class cannot be squared with the precedents of this Court, stressing the paramount importance of rules promulgated to protect the due-process rights of class members. By excusing itself from the burden of ensuring that the district court's ruling on certification issues complies with Rule 23, the Ninth Circuit threatens to transform the imperatives of *Amchem* and *Ortiz* into mere precatory goals.

3. Absent adequate notice, it is constitutionally impermissible for a judgment to have binding effect against the absentee members of the class. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). This Court has made clear both the fundamental place of notice under Rule 23, and the Due Process consequences of any inadequacy. The decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-77 (1974), emphasized the fundamental role of notice, ruling that the Due Process clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties

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[8] By contrast, the Fifth Circuit "fell short in its attention to *Amchem*'s explanation of the governing legal standards." *Ortiz*, 527 U.S. at 815.

of the pendency of the action and afford them an opportunity to present their objections."[9] Furthermore, the individual notice described in Rule 23(c)(2) "is not a discretionary consideration to be waived in a particular case." *Id.* at 176-77.[10]

The clarity of this Court's pronouncements about the individual notice requirement were not enough to prevent the respondents from sending individual notice only to those class members who were entitled to an automatic refund or rebate under the settlement – and then only if they were being mailed an account statement in July 2000. Once the issue of the adequacy of notice was raised by the settlors' request for certification of an opt-out settlement-only class and a final judgment on the proposed settlement, however, the district court was obligated to insure that the dictates of Rule 23(c)(2) had been met – and to decline to bind the members of the settlement class to the judgment if they were not. That duty existed independently of anyone questioning whether individual notice had been given as required. The "failure" by a putative

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[9] *See generally*, Wright, Miller & Kane, 7B FEDERAL PRACTICE AND PROCEDURE § 1786 at 188 ("Notice is crucial to the entire scheme of Rule 23(b)(3). . . . The notice serves to inform the absentees who otherwise might not be aware of the proceeding that their rights are in litigation so that they can take whatever steps they deem appropriate to make certain that their interests are protected. In this way it guarantees each class member an opportunity to have his day in court, or, at least, to oversee the conduct of the action by the representatives.").

[10] *See id.* § 1786 at 205. ("Thus, it is clearly settled that in Rule 23(b)(3) actions all identifiable class members must be given individual notice despite the cost that may be involved. The only way to avoid the consequences of *Eisen* may be to amend Rule 23.")

class member to point out the court's duties under Rule 23, or to request that the court follow the law, can neither bar nor excuse appellate review of notice that violates Rule 23(c)(2).

Furthermore, the notification of only some of the defendant-respondents' credit card holders had a detrimental effect on all class members. Compliance with notice requirements protects the participation rights of individual absent class members, but also assures that "the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). These due process benefits inure to the advantage of all the class members and cannot be waived by the settling parties or any one class member. In addition, the district court was denied the benefit of input from such un-noticed class members on the appropriateness of the settlement and class treatment.[11] *See Reynolds*, 288 F.3d at 288 ("It is desirable to have as broad a range of participants in the fairness hearing as possible" to assist the court in scrutinizing a proposed settlement). The notice deficiency thus forced the district court to make its ruling on the adequacy and fairness of the proposed settlement based upon a fatally underdeveloped record.

[11] This input could have been in the form of an election to request exclusion from the class, objections, or silence. Silence is meaningful as an indicator of a class member's position on the proposed settlement only if there is some assurance that she has adequate notice about the proposal.

The paramount importance of adequate notice to the legitimacy and integrity of settlement-only class judgments makes the question of compliance with the Rule 23(c)(2) individual notice requirement unwaivable in an appeal from a class settlement. The Court should grant this petition, and order briefing on the merits of the question presented, or summarily reverse the Ninth Circuit, and order that court to determine whether individual notice was due but not provided, and to determine the consequences that follow from that deficiency.

II. An expansion of waiver rules to block review of a claimed deficiency in Rule 23(c)(2) individual notice undermines Due Process and subverts proper supervision of class settlements.

1. The Ninth Circuit decided not to consider whether there had been a violation of the individual notice requirement and, if so, the consequence of that violation because petitioner's objections to the district court did not specifically complain of such a violation. Limiting appellate review to only those issues which an objecting class member particularized below constitutes an undue and illogical expansion of waiver doctrine. This is especially true when the issue is a claimed failure to abide by the Rule 23(c)(2) mandate regarding individual notice.

Particularity requirements can be appropriate when otherwise the record would be insufficient for the district court to rule on the matter or for the appellate court to perform an effective review. *See Bankers Life*, 486 U.S. at 79 (chief policy animating "not pressed or passed upon below" rule is "our own need for a properly developed record on appeal"); *Izumi Seimitsu Kogyo Kabushiki*

Kaisha v. U.S. Philips Corp., 510 U.S. 27, 38 n.8 (1993) (Stevens, J., dissenting from dismissal of writ of certiorari as improvidently granted) (noting need for "adequate development of the record").[12] In petitioner's case, however, the failure to comply with the individual notice requirement is discernible from record evidence submitted by the respondent-settlors; no further development of the record was necessary.

The settlors are the proponents of certification of a settlement-only class and approval of their proposed class settlement; the burden is on them to establish that such measures are due, and they have all the relevant facts to demonstrate that they have met the Rule 23(c)(2) standard. A class member can be expected to know whether he received individual notice, but will have no personal knowledge of whether individual notice was sent to every reasonably identifiable class member.[13] In addition, *Eisen*'s holding that no circumstance justifies deviation from the Rule 23(c)(2) standard, 417 U.S. at 176-77, eliminates any

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[12] *See also* James Wm. Moore, *et al.*, 19 MOORE'S FEDERAL PRACTICE § 205.05[1] (3rd ed. 2000) ("A circuit court will disregard the rule [of waiver and review an issue first considered on appeal] in compelling circumstances, such as . . . a serious issue of public policy, a change in the law, or for error that works manifest injustice. This is particularly so if the issue has been fully briefed, if the issue is a matter of law *or the record is complete*, if there will be no prejudice to any party, and if no purpose is served by remand to the district court.") (emphasis added).

[13] If a class member receives actual notice through a medium other than individual, mailed notice, she might be aware that (a) she is a reasonably identifiable member of the class and (b) she did not receive individual notice. She will not know, however, whether she was *sent* individual notice.

need to develop a record on what the minimum distribution should be. An objecting class member thus has no relevant facts to contribute to the record on this issue.

In addition, no net efficiency gain can be expected from a "particularity" test. Instead, it would burden all objectors' appeals with a vague and context-based preliminary inquiry about whether each issue raised on appeal had been sufficiently "particularized" in the district court. The erection of an additional barrier to having claims heard on appeal thus lacks any offsetting benefit to judicial administration.[14]

Demanding particularity in objections is also likely to disadvantage genuine objectors relative to "professional" objectors. The latter will adapt to such a review-limiting rule by adding

> "Class notice did not comply with the Rule 23(c)(2) requirement of individual notice."

to their "canned objections . . . lodging generic unhelpful protests." *Devlin*, 122 S. Ct. at 2017 (Scalia, J. dissenting) (internal quotation marks omitted). Moreover, greater specificity in objections will not necessarily improve a district court's consideration of certification and settlement issues. Petitioner's detailed complaints that the class

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[14] A particularity requirement in this context is as inappropriate as the "heightened pleading" standard struck down in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). This Court held that a Fifth Circuit rule requiring § 1983 claimants to plead specific facts supporting the existence of a municipal policy or the absence of qualified immunity was inconsistent with the philosophy of notice pleading underlying the Federal Rules of Civil Procedure. *Id.* at 167-68.

notice did not give him adequate time or information to decide whether to opt out or to have an effective opportunity to be heard on any objections he might have raised to the settlement (Pet. App. 18-19, 22-26) drew no evident reaction or comment from the district court. The district court allowed only 83 minutes for the Rule 23(e) "fairness" hearing, and, in the judgment, treated all objections as an undifferentiated mass.[15] Such cursory consideration of the content of objections is not extraordinary. *See Devlin*, 122 S. Ct. at 2017 (Scalia, J., dissenting) ("[D]istrict courts typically do not treat objections individually even on substance, let alone form."); Coffee, *Class Wars*, 95 COLUM. L. REV. at 1348 n.14 (citing a statistic that the median length of Rule 23(e) hearings in two districts was less than 40 minutes).

Finally, and perhaps most importantly, a particularity requirement increases the likelihood that settlors will fail to provide truly adequate notice, "such as one desirous of actually informing the absentee might reasonably adopt[.]" *Mullane*, 339 U.S. at 315 (internal quotation marks omitted). Specificity requires information. If notice is inadequate, it is unlikely that an objector can even identify all the ways in which certification or the settlement fails to meet the standards of Due Process and Rule 23; particularization of concerns, questions, and issues will be beyond the reach of all but the most resourceful of class members. The worse the notice, the fewer class members will be aware of the proposed settlement and the lower the probability that any member who does object will be able

[15] "Any objections that were filed, timely or otherwise, have been considered and are all overruled. . . . " (Pet. App. 9)

to obtain appellate review of procedural or substantive deficiencies in the settlement. A failure to provide individual notice, combined with untimely, content-deficient notice, would simultaneously violate all aspects of Rule 23(c)(2) and insulate those violations from appellate review.

2. Despite the unwaivable mandate of Rule 23(c)(2), the district court did not direct that individual notice be sent to all reasonably identifiable class members. Evidence presented by the plaintiff-respondents in requesting that judgment establishes both that individual notice was sent only to a subset of those class members who were mailed a credit-card statement in July 2000 – and that the failure to send individual notice to other class members was a deliberate provision in the settlement agreement. Nonetheless, an express part of the final judgment certifying the class and approving the settlement was a ruling that the notice given "complied fully with Rule 23 of the Federal Rules of Civil Procedure, due process, and any other applicable laws. . . . " (Pet. App. 9)

The Ninth Circuit's refusal to review a challenge to Rule 23 notice on direct appeal from a judgment expressly ruling that notice was compliant represents a complete departure from the ordinary and permitted use of the waiver doctrine. Furthermore, that refusal effectively sanctions a failure by the district court to enforce Due Process mandates necessary to the entry of judgments affecting absent members of a class. This calls for an exercise of this Court's supervisory power to require the Ninth Circuit to actually consider petitioner's contention that the notice planned and given by respondents omitted individual notice to identified as well as reasonably identifiable class members.

No other appellate court has invoked "waiver" to limit itself from reviewing a claimed deficiency in class notice when the court below actually passed upon the adequacy of that notice. The usual and acceptable invocation of waiver rules permits reviewing courts to decline to consider only those claims, arguments, or issues that were neither raised nor decided below; conversely, an issue is reviewable on appeal if it was "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 n.5 (2d Cir. 2002).[16] "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon. . . . " *Williams*, 504 U.S. at 41; *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("In fact, even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.").

The decision that petitioner's Rule 23(c)(2) challenge had been "waived" despite its being ruled upon by the district court represents a departure from the Ninth Circuit's usual waiver doctrine as well. Indeed, the decision cited by the panel for its conclusion that petitioner's notice issues had been waived, *Arizona v. Components, Inc.*, 66 F.3d 213 (9th Cir. 1995), focuses not on *who* raised an issue, but *whether* it was raised in the district court. In the *absence of a ruling by the court below*, it was necessary "that the argument must be raised sufficiently for the trial

[16] "A claim or an issue is 'pressed or passed upon below' when it fairly appears in the record as having been raised or decided." 19 MOORE, *supra*, § 205.05[1].

court to rule on it." *Id.* at 217 (internal quotation marks omitted). Here, the matter of class notice not only was raised (by the settlors), but was actually ruled on by the district court.

The Ninth Circuit does not explain or even acknowledge its addition of a precondition to review a claim that class notice was not sent to those mandated by Rule 23(c)(2). This omission by the Ninth Circuit is itself a departure from usual and acceptable practice: "At the least, the burden of justification rests on the proponent of any departure from the traditional norm." *Ortiz*, 527 U.S. at 842. Indeed, the lack of any explanation and the purported application of the standard rule stamp the refusal to review the adequacy of the class notice as an arbitrary and capricious denial of the appeal right that *Devlin* sought to assure.

The respondents and the district court have ignored the Due Process requirement of adequate notice and flouted the clear Rule 23(c)(2) mandate. Rather than confront the violation and vacate, set aside, or reverse the judgment as may be just under the circumstances, the Ninth Circuit avoided review. Thus, although this Court has declared itself "bound to follow Rule 23 as we understood it upon its adoption, and . . . not free to alter it except through the process prescribed by Congress in the Rules Enabling Act," *Ortiz*, 527 U.S. at 861, the Ninth Circuit does not accept a similar constraint or demonstrate that it accepts responsibility for ensuring that Rule 23 is followed by the district courts in its circuit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, CHARLES C. YEOMANS, Intervenor - Appellant and JOHN G. DAVISSON, et al., Intervenors v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees	Nos. 00-56958 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles
ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, DAVID G. BEHENNA, Intervenor - Appellant and JOHN G. DAVISSON, et al., Intervenors v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees	No. 00-57037 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, and JOHN G. DAVISSON, et al., Intervenors v. UNIVERSAL BANK, et al., Defendants - Appellees STEVEN C. SIMON, et al., Real Parties in Interest - Appellants	No. 01-55177 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles
ELLIOTT SCHWARTZ, an idividual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees DAVID G. BEHENNA, Real-Party- in-Interest – Appellants	No. 01-55179 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles (Filed Oct. 10, 2002)

JUDGES:

Before: THOMPSON and RAWLINSON, Circuit Judges and SCHWARZER, District Judge.**

OPINION:

MEMORANDUM[1]

Before: THOMPSON and RAWLINSON, Circuit Judges and SCHWARZER, District Judge.[2]

The appellants in these cases, Charles C. Yeomans, David G. Behenna, and Steven C. Simon et al., raise several objections relating to the district court's conditional certification of a class for settlement purposes, approval of the settlement, and award of attorney fees. We have jurisdiction pursuant to 28 U.S.C. § 1291.

As an initial matter, the appellants Behenna and Yeomans, unnamed class members who failed to intervene before the district court, have standing to appeal the district court's judgment approving the settlement. *See Devlin v. Scardeletti*, ___ U.S. ___, 153 L. Ed. 2d 27, 122 S. Ct. 2005, 2013 (2002). We reject, however, these appellants' contentions that conditional class certification was improper, that notice was insufficient, and that the district

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** The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[2] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

court failed to properly evaluate the fairness of the settlement.

Although the district court failed to make explicit findings regarding the appropriateness of class certification, we need not remand to allow the entry of self-evident findings. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998). The class, as defined by the district court, was sufficiently cohesive to satisfy the requirements of Federal Rule of Civil Procedure 23(b)(3). *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997). Regardless of the potential differences in damages suffered by class members, all of their claims stem from Citibank and Universal's failure to credit payments to consumers' accounts as of the date on which they were received, unless the payments were received before 10:00 AM that day. Thus, the class members' claims are "sufficiently cohesive to warrant adjudication by representation." *Id.* (citation omitted). In addition, the named class representatives adequately and fairly represent the interests of the class as required by Federal Rule of Civil Procedure 23(a)(4). There is no inherent conflict of interest between the named plaintiffs, all of whom actually suffered late fees or finance charges as a result of defendants' polices, and those class members who suffered no similar injury. *Hanlon*, 150 F.3d at 1020. The overarching goal of this litigation was to reimburse cardholders for finance charges and late fees actually incurred as a result of the defendants' early cut-off policy, and to change that policy. Each of the class plaintiffs, regardless of whether a monetary loss was suffered, had a similar interest in obtaining relief from the defendants' policy. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th

Cir. 2000). We conclude that class certification was appropriate.

The claims asserted on appeal challenging the timeliness and sufficiency of notice have been waived because they were not raised in the district court. *Arizona v. Components, Inc.*, 66 F.3d 213, 217 (9th Cir. 1995).

We also conclude that the settlement approved by the district court, including the provision for the independent payment of attorney fees, was "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e); *In re Mego*, 213 F.3d at 458. A cash settlement fund in the amount of $18 million was established to reimburse class members for finance charges and late fees incurred as a result of Citibank and Universal's early payment cut-off policy and to provide statutory damages. Citibank and Universal also agreed to substantial other relief, estimated by class counsel's expert to be worth at least another $18 million. Finally, Citibank and Universal agreed to independently pay class counsel's fees, in an amount to be determined by the district court, and agreed not to oppose an application seeking fees of up to $9 million.

Although the district court made no explicit findings, appellants have not shown approval of the settlement to have been an abuse of discretion. *Hanlon*, 150 F.3d at 1026-27. Nor have they shown anything inherently improper about the parties' negotiation of an agreement providing for the independent payment of class counsel's fees, and Citibank and Universal's agreement not to oppose a fee application which sought up to $9 million. *See Evans v. Jeff D.*, 475 U.S. 717, 738-40, 89 L. Ed. 2d 747, 106 S. Ct. 1531 (1986); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1325-26 (9th Cir. 1999).

We reject the arguments of the appellants Behenna and Simon et al. challenging the method used by the district court to calculate class counsel's fees and the ultimate amount of fees awarded. Even assuming that the settlement did not create a "common fund" as a result of the agreement that class counsel's fees would be paid independently by Citibank and Universal, the district court was not required to apply the lodestar method to calculate class counsel's fees. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 990 (9th Cir. 1997) (declining to establish bright line rule requiring the application of a particular method for calculating a fee award in a case such as this where class counsel's fees are to be paid independently, rather than out of the settlement fund). The district court articulated adequate reasons why the percentage of recovery method was preferable to the lodestar method of calculating class counsel's fees, and the court did not abuse its discretion in applying the former method rather than the latter.

The amount of the fees awarded to class counsel pursuant to the percent of recovery method was $7.2 million. That amount represented 20% of the $36 million total value of the settlement. Given the factors articulated by the district court, the court did not abuse its discretion in awarding fees of $7.2 million. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

Finally, as stated above, it was not improper for the settlement agreement to provide for the independent payment of attorney fees by Citibank and Universal. Under the settlement agreement, Citibank and Universal did not agree to pay $9 million in attorney fees. They agreed to pay fees in an amount to be determined by the

court, up to a maximum of $9 million. The court determined the amount of fees to be paid was $7.2 million. Citibank and Universal have no obligation to pay an additional $1.8 million to the class.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ELLIOTT SCHWARTZ, NICOLE C. GIAMPAULO, WILLIE JO JIMMERSON, DANIEL RYAN and MARY ANN WILLIAMS, individually and on behalf of all others similarly situated, Plaintiffs, vs. CITIBANK (SOUTH DAKOTA), N.A.; UNIVERSAL BANK, N.A.; UNIVERSAL FINANCIAL CORP.; and DOES 1 through 10, inclusive, Defendants	Case No. 00-00075 LGB (JWJx) CLASS ACTION (~~PROPOSED~~) FINAL JUDGMENT AND ORDER GRANTING FINAL APPROVAL OF SETTLEMENT Date: September 25, 2000 Time: 10:00 a.m. Room: 780 Assigned to the Honorable Lourdes G. Baird

Representative Plaintiffs' motion for final approval of settlement with Defendants Citibank (South Dakota), N.A., Universal Bank, N.A. and Universal Financial Corp. came on for hearing, as scheduled, on September 25, 2000, at 10:00 a.m., in Courtroom 780 of the above-referenced Court, located at 255 East Temple, Los Angeles, California 90012. Having considered the motion and based upon the supporting documentation, the records, and files in this case, the points, and authorities filed in support of this motion and the arguments of counsel and good cause appearing, the Court orders:

1. That the settlement is finally approved as fair, reasonable, adequate, and in the best interests of the Class.

Any objections that were filed, timely or otherwise, have been considered and are all overruled;

2. That the following class will be finally certified for settlement purposes only:

> *"All consumers (as that term is defined in Regulation Z. 12 C.F.R. § 226.2(a)(11)) who had as of July 11, 2000, or have had, one or more Visa or MasterCard credit card accounts marketed under the "Citibank" or "AT&T Universal Card" brands. This Class definition shall not include any calling card account or feature."*

(hereinafter referred to as the "Settlement Class")

In the event that the Settlement Agreement is terminated or disapproved in whole or in part by the Court, any appellate court, or any of the parties, this certification shall be automatically terminated;

3. That the Class Notice (i) constituted, under the circumstances, the most effective and practicable notice of the pendency of this lawsuit, the Settlement Agreement, and the Approval Hearing, and (ii) complied fully with Rule 23 of the Federal Rules of Civil Procedure, due process, and any other applicable laws;

4. That the Settlement Agreement has been entered into in good faith following arms length negotiations and is non-collusive;

5. That Elliot Schwartz, Nicole C. Giampaulo, Willie Jo Jimmerson, Daniel Ryan, and Mary Ann Williams, are finally approved as representatives of the Settlement Class. In the event that the Settlement Agreement is terminated or disapproved in whole or in part by its own terms, by the Court, any appellate court, or any of the

parties, this designation shall be automatically terminated;

6. That Brian R. Strange, Barry L. Kramer, Timothy J. Crowley, Britton D. Monts, and C. Cary Patterson are finally approved as Class Counsel. In the event that the Settlement Agreement is terminated or disapproved in whole or in part by its own terms, by the Court, any appellate court, or any of the parties, this designation shall be automatically terminated;

7. That this action be dismissed with prejudice as to Plaintiffs and all Class Members who did not obtain exclusion from the Class, without fees or costs, as provided in the Settlement Agreement. Plaintiffs and all Class Members who did not opt out of the Class, their respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, assigns, and any authorized users of their accounts shall be deemed to have fully released and forever discharged Defendants; their present, former, and future direct and indirect parent companies, affiliates, subsidiaries, agents, successors, predecessors-in-interest, and/or any financial institutions, corporations, trusts, or other entities that may hold or have held any interest in any account or any receivables relating to any account, or any pool of receivables, or any interest in the operation or ownership of the AT&T Universal Card business or the Citibank Visa or MasterCard business; and all of the aforementioned's respective officers, directors, employees, attorneys, vendors (including processing facilities), and assigns, from any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or equity, whether known or unknown, suspected or

unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, as of the date of Final Judgment and order, (1) that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were directly or indirectly alleged, asserted, described, set forth, or referred to in the California Lawsuit and the Texas Lawsuit (including but not limited to claims for alleged violations of TILA (including the Fair Credit Billing Act), state consumer protection statutes, common law prohibiting unfair or deceptive trade practices, breach of contract, fraud, and misrepresentation); (2) that are, were, or could have arisen out of or been related in any way to Defendants' failure (or alleged failure) to obtain, receive, process, and/or credit any payments in timely fashion and/or as of the proper date and/or cut-off time; or (3) that are, were, or could have arisen out of or been related in any way to Defendants' disclosure, application, or use of any cut-off time for the receipt of credit card payments. The releases identified in this paragraph shall be referred to herein as the Released Claims, and the parties released shall be referred to herein as the Released Parties.

8. That, without limiting the foregoing, the Released Claims specifically extend to claims that the Class Members do not know or suspect to exist in their favor at the time that the Settlement Agreement, and the releases contained therein, become effective. Plaintiffs and other Class Members have waived Section 1542 of the California Civil Code, and Section 20-7-11 of the South Dakota Codified Laws, each of which provides that "[a] general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of

executing the release, which if known by him must have materially affected his settlement with the debtor." If Plaintiffs and Class Members hereafter discover facts in addition to, or different from, those facts which they now know or believe to be true with respect to the subject matter of this Settlement Agreement, they have nevertheless released fully, finally, and forever all Released Claims. The release of these Claims shall be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

9. That, absent a change in statutory law or a change in applicable regulations, Plaintiffs and each Class Member may not hereafter claim against Defendants or other Released Parties that the application or use of a credit card payment cut-off hour of 1:00 p.m., local time, is or was wrongful or actionable, or that notice of such cut-off hour when provided as specified in this Settlement Agreement is in any way inaccurate, inadequate, or actionable.

10. That, in aid of the Court's jurisdiction to implement and enforce the settlement, Plaintiffs and all members of the Settlement Class who did not timely request exclusion are permanently enjoined and barred from commencing or prosecuting any action asserting any of the Released Claims, or any claim subject to the stipulation in paragraph 25 of the Settlement Agreement, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, defense, otherwise, in any local, state, or federal court, or in any agency or other authority or forum wherever located;

11. The Court shall retain continuing jurisdiction over this case, the Parties, and all Class Members who did

not timely exclude themselves, to determine all matters relating in any way to the Final Approval Order of the Settlement Agreement, including but not limited to their administration, implementation, interpretation, and enforcement;

12. In the event that the settlement does not become final in accordance with the terms of the Settlement Agreement, this order shall be rendered null and void and be vacated; and

13. That the Settlement Agreement, this Order, and all papers related to the settlement, are not and shall not in any event, be an admission by the Defendants, or any other person, of any liability or wrongdoing whatsoever.

IT IS SO ORDERED.

Dated: October 12, 2000 By: _____

The Honorable Lourdes G. Baird
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, CHARLES C. YEOMANS, Intervenor - Appellant and JOHN G. DAVISSON, et al., Intervenors v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees	Nos. 00-56958 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles
ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, DAVID G. BEHENNA, Intervenor - Appellant and JOHN G. DAVISSON, et al., Intervenors v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees	No. 00-57037 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, and JOHN G. DAVISSON, et al., Intervenors v. UNIVERSAL BANK, et al., Defendants - Appellees STEVEN C. SIMON, et al., Real Parties in Interest - Appellants	No. 01-55177 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

ELLIOTT SCHWARTZ, an idividual on behalf of himself and all others similarly situated, et al., Plaintiffs - Appellees, v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants - Appellees DAVID G. BEHENNA, Real-Party- in-Interest – Appellants	No. 01-55179 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles ORDER (Filed Nov. 18, 2002)

Before: THOMPSON and RAWLINSON, Circuit Judges and SCHWARZER, District Judge.*

The panel, as constituted above, has unanimously voted to deny appellant Yeomans' petition for rehearing. Judge Rawlingson has also voted to deny his petition for rehearing by the court en banc, and Judges Thompson and Schwarzer have recommended that that petition be denied.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en bank rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

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836 Euclid Avenue, Ste. 302
Lexington, KY 40502
(859) 268-3870
(no fax)

PRO SE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELLIOTT SCHWARTZ, ET AL.	) Civil Action No. 00-CV-75
Plaintiffs	) **OBJECTION**
v.	) Sept. 18, 2000
CITIBANK (SOUTH DAKOTA) N.A., ET AL.	) 10:00 AM
Defendants	)

I object to the proposed settlement; please see my attached affidavit. On August 29, 2000, I served a copy of this by first-class mail to:

Brian R. Strange, Esq.
Strange & Hoey 12100
Wilshire Blvd., 19th Fl. Los
Angeles, CA

Jay Ziegler, Esq.
Buchalter Nemer Fields
& Younger
601 S. Figueroa St.,
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Los Angeles, CA 90017-5704

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PRO SE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ELLIOTT SCHWARTZ, ET AL.)	Civil Action No. 00-CV-75
Plaintiffs)	**Affidavit of Charles C. Yeomans**
v.)	
CITIBANK (SOUTH DAKOTA) N.A., ET AL.)	
Defendants)	

Charles C. Yeomans, being duly sworn, states as follows in support of his objections to the proposed settlement:

1. My name is Charles C. Yeomans, and I am a resident of Lexington, Kentucky.

2. I have a credit card account marketed under the "Citibank" brand.

3. In the first part of August, 2000, I received my August 2000 statement from Citibank. On August 19, I opened my bill to pay it. Contained therein was a notice of settlement of a class action Schwartz, et al. v. Citibank, et al. Before reviewing that settlement notice, I had no knowledge of the lawsuit or the proposed settlement.

4. In order to make an informed decision as to whether I should remain a member of the settlement or to opt out, I sought more information. I have searched Citibank's web site for more information, but I am unable to find any mention of Schwartz, this lawsuit, or the proposed settlement on its web site. In addition, I have searched other sites on the web, since there are

now several web sites devoted to publishing class settlement information, but found nothing pertaining to the proposed settlement.

5. Realizing that the deadline for opting out was fast approaching, I managed to track down a phone number for class counsel Strange & Hoey – no phone number was given in the settlement notice – on August 28, 2000. I called and asked for more information on the settlement; in particular, I asked for a copy of the settlement agreement. They agreed to send me one by mail, but refused my request to send one by fax or by e-mail, even though I pointed out that I would likely not receive a copy by August 31, the deadline for opting out of the settlement. My request for a copy of the complaint was refused totally; I was told that I " . . . would need to get that from the Court".

6. I have sought the assistance of counsel in reviewing the settlement notice, but am unable to understand from the disclosures made how my rights and interests will be affected by the proposed settlement.

7. I do *not* agree that it is proper for Citibank to receive a consumer credit card payment after 1:00 p.m. on a given business day but not credit the payment as of that day, and therefore dispute that this is a benefit of the settlement.

8. I do *not* agree that the disclosures provided for in the Settlement Agreement (which I have not seen) are adequate.

9. I do *not* waive any rights I have under California Civil Code § 1542, South Dakota Codified Laws § 20-7-11, or otherwise, and will *not* release claims which I do not know or suspect to exist in my favor.

10. In addition, I have not and do not authorize Citibank or the other defendants to disclose to class counsel (or

anyone else) any information about my credit card account marketed under the "Citibank" brand.

Further affiant sayeth not.

_____

CHARLES C. YEOMANS

Commonwealth of Kentucky)

County of Fayette)

Subscribed and sworn to before me by Charles C. Yeomans this ___ day of August, 2000

_____

Notary Public

(Seal)

Katherine K. Yunker
Ky. Bar # 79592
YUNKER & ASSOCIATES
P.O. Box 21784
Lexington, KY 40522-1784
859-266-0415
fax: 859-266-3012

Counsel for Charles C. Yeomans

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELLIOTT SCHWARTZ, ET AL. Plaintiffs v. CITIBANK (SOUTH DAKOTA) N.A., ET AL. Defendants	Civil Action No. 00-CV-75 LGB **Objections to Proposed Settlement** Hearing: 9/18/00 10 a.m.

Charles C. Yeomans, with the assistance of counsel, hereby objects to the proposed settlement of this proceeding as it is described in the Class Action Settlement Notice he received. In addition to his affidavit attached as Exhibit 1, Yeomans states as follows:

1. On August 29, 2000, Yeomans *pro se* sent to the Clerk of the Court (via an overnight delivery service) for filing and to Messrs. Strange and Ziegler (via first-class U.S. mail) his Objection, consisting of the statement that he objects to the proposed settlement and an attached affidavit by him. A copy of the Affidavit of Charles C. Yeomans, the original of which is attached to the original of his Objection, is attached hereto as Exhibit 1.

2. Concurrently herewith, counsel for Yeomans is submitting her Application for Permission to Appear and Participate *Pro Hac Vice* (as well as an Application of Non-Resident Attorney to Appear in a Specific Case, on this Court's form G-64). In case the Court does not grant counsel's application, Yeomans has signed this filing; if the Court does not grant his counsel's application, Yeomans requests that this be treated as a filing by him *pro se* and that it be considered along with his initial Objection.

3. The Rule 23(e) notice of the proposed compromise does not adequately inform absent class members like Yeomans so that he may make a reasoned decision about whether to stay in or opt out or to have an effective opportunity to be heard on any objections he may have to the proposed settlement.

4. Yeomans did not receive actual notice of the proposed settlement until August 19, 2000 (Yeomans Aff. ¶ 3), less than two weeks before the noticed deadline for opting out or objecting to the proposed settlement. Particularly because of the deficiencies in the notice given (see ¶¶ 7-9, below), this period of actual notice has been insufficient for Yeomans to assess whether he should remain as a member of the class and what objections he might have to the maintenance of the litigation as a class or to the terms of the proposed settlement.

5. Although the Court granted preliminary approval to the proposed settlement on May 5, 2000, the Class Action Settlement Notice brochure was not printed until July 2000, and Yeomans was not sent the brochure (as an insert to his credit card account billing) until early August 2000.

6. The Class Action Settlement Notice brochure ("the Notice") is the only notice or information Yeomans has received about the proposed settlement or the underlying lawsuit. He has sought out further information, but the only additional information he has obtained is the docket for this proceeding maintained on the PACER system.

7. The Notice contains no telephone numbers other than one for requesting a claim form (Notice V); it omits any mention of efficient and effective means of disseminating information about the settlement (*e.g.*, a Web site) used in other class settlements. Defendant Citibank (or its parent corporation) maintains an extensive Web site on which no information about the lawsuit appears to be posted. *See* Yeomans Aff. ¶ 4.

8. The only method for requesting additional information about the settlement mentioned in the Notice is to write to class counsel at a post office box. Class counsel declines to transmit information by any more expedited means than U.S. mail or to provide copies of the pleadings in the underlying lawsuit. *See* Yeomans Aff. ¶ 5. The Notice explains that the filings in the lawsuit are publicly available at the Spring Street, Los Angeles, offices of the Clerk of the Court; however, limiting access to this information to those with the opportunity to travel to Los Angeles is not reasonable for an apparently national (or even international) class action – particularly given the short period of time allowed to opt out or object.

9. The information provided in the Notice is incomplete, ambiguous, or confusing. For example:

a. The release (Notice V) is described as including all claims related to those "alleged, asserted, described, set forth, or referred to in this lawsuit."

Without the pleadings, it is not possible to know what those claims might be. The claims are summarized at one point (Notice I) as alleging violations of TILA, state consumer protection laws, and common-law prohibitions against unfair or deceptive trade practices, breach of contract, and misrepresentation; a slightly more expanded list is presented elsewhere as non-exclusive (Notice V).

b. The release description (Notice V) expressly warns that "the exact terms of the Release are set forth in the Settlement Agreement," but no effective access to that settlement agreement is provided.

c. The statement (Notice VI) that the recipient will be a member of the class unless he opts out is an inaccurate paraphrase of the Rule 23(c)(2)(B) requirement of advice that the judgment will include all members who do not request exclusion, which allows for the possibility that no class will be certified, a class certified may be de-certified, or no class judgment will be entered. In addition, the statement that "[i]f you do not opt out, . . . you will be represented in this lawsuit by the Class counsel" (Notice VI), contradicts the required Rule 23(c)(2)(C) notice that a class member may enter an appearance through counsel of his own choosing. The later statement of that right (Notice VIII) is unduly discouraging and restrictive.

d. Furthermore, the scope of the class provisionally certified is unclear. The opening of the Notice refers to a class of consumers with "one or more Visa or MasterCard credit card accounts marketed under the 'Citibank' brand." The possible distributions do not appear to reach all those who ever have had such an account, and it is unlikely that all such persons have a claim, known or unknown, upon which this Court has jurisdiction to enter a judgment.

e. Uncertainty about the scope of the class, lawsuit, and settlement is further compounded by the presence of "Doe" defendants, the release of "Citibank and certain others" (Notice V) – perhaps a group more or less inclusive than "the defendants," and the warning (Notice VII) that an exclusion request must be made with respect to a dual-branded account if a separate Notice has been received from "another defendant in this lawsuit."

f. The criteria or bases for the distribution of the $0.5 million in statutory damages under 15 U.S.C. § 1640(a)(2)(B) are not explained other than to state that this settlement portion will benefit "certain Citibank cardholders" (Notice II.A.3(iii)) – apparently some or all of those receiving other distributions under the settlement.

10. Without adequate notice, Yeomans can only raise questions (not comprehensive or detailed objections) about the fairness of the proposed settlement, the satisfaction of the Rule 23(a) prerequisites to a class action, or the maintainability of a Rule 23(b)(3) class. Among the reasons the proposed settlement and class are questionable are the following:

a. The inadequacy of the notice given casts doubt on whether the representative plaintiffs (through Class counsel) "will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4).

b. The inadequacy of the notice given makes it questionable that class members must affirmatively request reimbursement of late fees. It is also objectionable that the first $2.5 million of the amounts *not* spent in reimbursing late fees should be returned to the Defendants "as reimbursement for their costs of settlement (including costs of class notice and claims

administration)" (Notice II.B), without requiring proof of the expenditures and particularly since the notice given was so inadequate.

c. The parties' "belief" that the benefits to the proposed class are at least $36 million (Notice III) is unsupported; furthermore, an award of attorneys' fees equal to 25% of that "believed" benefit would be unjustified in the light of the inadequacy of the notice given and the undeveloped state of the litigation.

d. Claims for reimbursement of late fees (Notice II.B) must be supported by documentary evidence as to when Citibank received payment. This places a requirement on the settlement "beneficiary" that he cannot reasonably be expected to meet. Furthermore, it does not address the possibility that payment on the "Citibank" branded account was received by another defendant or by a third party.

e. It is unexplained (and questionable) that Citibank is able to credit payments received prior to the end of the payment due date for purposes of assessing late fees, but not those received after 1:00 p.m. (but before the end of the due date) for purposes of assessing finance charges. *Compare* Notice II.A.1 *and* Notice II.A.2.

f. Yeomans has made a specific objection (*see* Yeomans Aff. ¶¶ 7-9) to the provisions of the settlement agreement that would purport to release or waive claims of which he is unaware or which have not yet arisen or which operate prospectively. Such claims are not justiciable or can be released/waived only with the affirmative, express consent of the potential claimant upon a full and fair disclosure. The insistence on such consent in a written agreement between named, present parties settling a simple, bilateral lawsuit would be a matter of concern; its

presence in a proposed settlement expected to affect millions of absent class members suggests that the settlement is *not* fair. It also raises concerns that the representative parties cannot fairly and adequately protect the interests of the class.

g. The settlement agreement apparently proposes to settle claims beyond those which are the subject of the underlying lawsuit or which could be adjudicated as to members of the class. For example, the pleadings are described as alleging violations of state law (judge-made and statutory) against unfair and deceptive trade practices, fraud, and misrepresentation. It is unlikely that any of the original or later-added representative plaintiffs presented claims or defenses under Kentucky's Consumer Protection Act or its common law prohibiting unfair, deceptive, or fraudulent practices, even though these laws are the ones applicable to Yeomans' claims. Their claims thus are not "typical" of Yeomans' as is required by Rule 23(a)(3). In addition, the inclusion of state-law claims for all the class members would undermine the Rule 23(b)(3) requirement that common questions of law or fact predominate over individual ones.

h. The proposed class apparently includes persons who do not have present claims against the defendants, and the proposed settlement might exclude from its benefits some class members who do have present claims (*e.g.*, those who paid a finance charge before January 1, 1998). These claims are either not justiciable, not amenable to class disposition, or both, and the holders of such claims cannot have been adequately and fairly represented in the settlement agreement.

WHEREFORE, Yeomans respectfully requests that the Court *not approve* the proposed settlement.

Respectfully submitted,

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